SYARIKAT YING MUI SDN BHD

v.

YEH YING SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: D5-22-497-2002]
9 JULY 2003

CIVIL PROCEDURE: *Appeal - Ruling of Senior Assistant Registrar - Whether amounted to a "decision" - Whether a mere "ruling" - Whether could be appealed against - Rules of the High Court 1980 O. 18 r. 19, O. 24 rr. 10, 11, O. 56 r. 1 - Courts of Judicature Act 1964 s. 3*

The defendants appealed against the decision of the learned Senior Assistant Registrar who dismissed their application *vide* Form 43 of the Rules of the High Court ('RHC') requiring the plaintiff to produce some documents for their inspection. Before the learned judge, a preliminary issue was raised as to whether the ruling as made by the learned Senior Assistant Registrar amounted to a "decision" as defined in s. 3 of the Courts of Judicature Act 1964, and further, whether it could not be appealed against, since the ruling was made in the course of a hearing of the defendants' striking out application under O. 18 r. 19(1) RHC (still pending and fixed for decision on 15 July 2003 before the learned Senior Assistant Registrar) which did not determine nor finally dispose of the rights of the parties.

Held (dismissing the appeal):

[1] There is no definition of "decision" in the RHC and similarly there is no definition of "judgment" or "order". There is no reason why the amended definition in the Courts of Judicature Act 1964 should not be equally ascribed to the definition of "decision" in O. 56 r. 1 of the RHC. The guidelines of contextual interpretation from the maxim of *noscitur a sociss* that associated words take their meaning from another is trite law. The words "judgment" or "order" should take their colour from the meaning of the word "decision" as amended by the Courts of Judicature Act 1964. Any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose the rights of the parties does not constitute a "decision" for the purposes of the Courts of Judicature Act 1964 as amended. It is simply and lucidly stated leaving no doubt as to its application as its intention was to serve as a filter process for appeals. [*Syarikat Tingan Lumber Sdn Bhd v. Tokong Timber Sdn Bhd* [2003] 2 CLJ 177 (foll)] (pp 744 h-i & 745 a-g)

[2] The ruling or order made by the learned Senior Assistant Registrar on 10 January 2003, (which is the subject matter of the present appeal) is merely a "ruling" as opposed to a "decision" as defined under s. 3 of the Courts of Judicature Act 1964 because it does not determine nor finally dispose the rights of the parties in the main suit. Thus, it is not appealable. (p 746 a-b)

Obiter

[1] Order 24 r. 10(1) of the RHC clearly provides the document to be produced thereunder must relate to document(s) which is referred to or mentioned in any pleadings or affidavit of the other party. The purported documents which the defendants required or intended to be produced by the plaintiff were never referred to or mentioned by the plaintiff in para. 8 of the said affidavit-in-reply within the meaning of O. 24 r. 10(1) of the RHC. The court is satisfied that the defendants' application is in reality an application for the plaintiff to show proof at an early stage of the proceedings and tantamounts to a fishing expedition and an abuse of the process of the court. (pp 747 d-f & 748 h)

Case(s) referred to:

Coopers & Lybrand v. Singapore Society of Accountants & Ors [1988] 3 MLJ 134 ***(dist)***

Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(foll)***

Dubai Bank Ltd v. Galadari & Ors (No 2) [1990] 2 All ER 738 ***(refd)***

Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd [1981] 1 MLJ 105 ***(dist)***

Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shen [1990] 2 MLJ 28 ***(dist)***

Quilter v. Heatly [1883] 23 Ch D 50 ***(refd)***

Re Abu Bakar PC Kuaya; ex parte Navaratnam Siva Samboo [2002] 6 CLJ 381 HC ***(refd)***

Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(foll)***

Syarikat Tingan Lumber Sdn Bhd v. Tokong Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(foll)***

Legislation referred to:

Companies Act 1965, s. 133A

Courts of Judicature Act 1964, s. 3

Rules of the High Court 1980, O. 18 r. 19(1)(a)(b), (d), O. 24 rr. 3, 7, 10(1), 11(1), O. 56 r. 1

Rules of the High Court [Sing], O. 25

For the plaintiff - HQ Kwong; M/s Heiley Hassan, Tan & Partners
For the defendants - Ng Tee Fung; M/s Benjamin Ng & Partners

Reported by Yasmin Norhazleena

JUDGMENT

Ramly Ali J:

This is an appeal by the defendants against the decision of the learned Senior Assistant Registrar dated 10 January 2003 whereby the defendants' application requiring the plaintiff to produce some documents for their inspection through a notice in Form 43 (of the RHC) was dismissed.

The plaintiff's cause of action against the 1st defendant is, *inter alia*, for money lent in the sum of RM520,000 by the plaintiff to the 1st defendant *vide* the plaintiff's Kwong Yik Bank Bhd cheque no: 734283 dated 8 April 1996, signed by the 2nd defendant who was a director of the plaintiff. It is not disputed that the 2nd defendant was also, at all material times, a director of the 1st defendant. The plaintiff's further or alternative cause of action against the 1st defendant is under constructive trust, for the said sum of RM520,000 being made by the plaintiff and received by the 1st defendant as a volunteer and without consideration *vide* the said cheque. In its pleadings, the plaintiff alleges that the said loan or payment to the 1st defendant was wrongfully authorised by the 2nd defendant in breach of his fiduciary duty to the plaintiff and/or in breach of trust and/or was a misfeasance, full particulars of which are contained in the statement of claim. The plaintiff also alleges that the said loan or payment constituted a misapplication or misappropriation of the plaintiff's funds and by reason thereto, the above unauthorised act of the 2nd defendant has also resulted in the plaintiff contravening s. 133A of the Companies Act 1965. Hence, the plaintiff's claim against the 2nd defendant is for, *inter alia*, damages for breach of fiduciary duty or breach of trust.

The defendants' defence is essentially that:

(a) it was the 2nd defendant's mother, Yow Yow Mui (deceased) and not the plaintiff who gave the loan of RM520,000 to the 1st defendant using funds/monies from a loan account Yow Yow Mui (deceased) had with the plaintiff; and

(b) this loan made by Yow Yow Mui (deceased) to the 1st defendant was repaid to her *vide*, *inter alia*, 3 HLBB cheques in favour of the respondent/plaintiff totalling RM500,000 ie, the 2nd defendant's cheque no. 610026 for RM300,000, the 1st defendant's cheque no. 204342 for RM100,000 and the 2nd defendant's cheques no 610031 for RM100,000 and all dated 23 March 1997 (exh. "HKH2" encl. 6) for the purpose of direct payment into Yow Yow Mui's loan account with the plaintiff."

The defendants, *vide* encl. 7, applied for the plaintiff's claim against them to be struck off under O. 18 r. 19(1)(a)(b) and (d) of the RHC on the ground that:

(a) it discloses no reasonable cause of action; or

(b) it is scandalous, frivolous or vexatious; or

(c) it is an abuse of the process of the court.

The plaintiff, in resisting the defendants' application for striking out its claim, in its affidavit dated 18 September 2002 *inter alia* clarified and explained that the sum RM500,000 *vide* the 3 HLBB cheques (as stated in the defendants' defence) was for the purpose of repayment of a separate and distinct loan of RM500,000 (and not RM520,000) made by the said Yow Yow Mui (deceased) to the 2nd defendant personally (and not to the 1st defendant). The defendants then (on 21 November 2002) served a copy of a notice in Form 43 (notice to produce documents referred to in pleadings or affidavits) (encl. 25) on the plaintiff requiring the plaintif to produce for their inspection the following documents:

(a) copy of the cheque for RM500,000 which was alleged to have been issued to the 2nd defendant;

(b) copy of the voucher for the said amount of RM500,000 which was alleged to have been signed by the 2nd defendant;

(c) documents, particulars of accounts, funds, deposits, and investments of the said Yow Yow Mui (deceased) showing the sources from where the said sum of RM500,000 come from.

Apparently, the plaintiff failed to respond to the said notice within the stipulated time. Then, the defendants filed their application for an order that the plaintiff to produce those documents as provided under O. 24 r. 11 of the RHC (encl. 27).

On 10 January 2003, the learned SAR dismissed the said application. Hence the defendants filed the present appeal.

Preliminary Issue

A preliminary issue was raised: whether the ruling made by the learned SAR dated 10 January 2003 in dismissing the defendants' application amounts to a "decision" as defined under s. 3 of the Courts of Judicature Act 1964 and thus not appealable since the ruling was made in the course of a hearing of the defendants' application under O. 18 r. 19(1) for striking out the plaintiff's claim (encl. 7) (still pending and fixed for decision on 15 July 2003 before

the learned SAR) which does not determine or finally dispose of the rights of the parties.

Order 56 r. 1 of the RHC provides that "an appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar." The word "decision" as defined under s. 3 of the Court of Judicature Act 1964 (as amended by Act A 1031 in 1998) means "judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not dispose of the rights of the parties" (see: *Re Abu Bakar PC Kuaya; ex parte Navaratnam Siva Samboo* [2002] 6 CLJ 381).

In *Dato' Seri Anwar Ibrahim v. P*P [1999] 1 CLJ 537, the Court of Appeal ruled that "what the 1998 amendment means is that, a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matter in dispute, is not a "decision" within the meaning of that word in the current version of s. 3 of the Court of Judicature Act, and therefore not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive as to the subordinate matter which it deals".

In another Court of Appeal case, *Saad Abas & Anor v. PP* [1998] 4 CLJ 575, Lamin Mohd Yunus PCA, has also ruled that:

> Be that as it may, whether it is a judgment, decision or order pronounced by a Court, there must be an element of finality before there can be an appeal.

More recently, the Court of Appeal in *Syarikat Tingan Lumber Sdn Bhd v. Tokong Timber Sdn Bhd* [2003] 2 CLJ 177, has also echoed and endorsed the same sentiments and legal reasoning to the same issue. In that case, the Court of Appeal ruled that:

> There is no definition of "decision" in the RHC and similarly, there is no definition of "judgment" or "order". There is no reason why the amended definition in the CJA should not be equally ascribed to the definition of "decision" in Order 56 r 1 of the RHC. The guidelines of contextual interpretation from the maxim of noscitur a sociis that associated words take their meaning from one another is trite law. The words "judgment" or "order" should take their colour from the meaning of the word "decision" as amended by the CJA.

The Court of Appeal further ruled that:

> Any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties does not constitute a "decision" for the purposes of the CJA as amended. It is simply and lucidly stated leaving no doubt as to its application as its intention was to serve as a filter process for appeals.

In the present case, the ruling or order made by the learned SAR on 10 January 2003, (which is the subject matter of the present appeal) is merely a "ruling" as opposed to a "decision" as defined under s. 3 of the Courts of Judicature Act 1964 and thus by virtue of the above authorities, is not appealable. It does not determine or finally dispose the rights of the parties in the main suit. It was made in the course of hearing the defendants' application for striking out the plaintiff's claim under O. 18 r. 19 (which is still pending and fixed for decision before the learned SAR on 15 July 2003) which did not dispose the rights of the parties finally.

On this preliminary issue alone, the court rules that the defendants' appeal must fail and be dismissed with costs.

Merits Of The Appeal

Assuming that the said decision of the learned SAR is appealable, the court shall now proceed to consider the merits of the appeal.

The defendants' notice to produce documents referred to in affidavit dated 21 November 2002 (enc. 25) was purportedly made under O. 24 r. 10(1) of the RHC 1980, which reads:

> Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.

Also relevant to the said application is O. 24 r. 11 of the RHC 1980, which reads:

> If a party ... who is served with a notice under rule 10(1), fail to serve a notice under rule 10 (2) ..., then, subject to rule 13(1), the Court may, on the application of the party entitled to inspection, make an order in Form 45 for production of the documents in question at such time and place, and in such manner, as it thinks fit.

In both encl. 25 and encl. 27, the defendants in their prayers, referred to "... dokumen-dokumen yang **disebut** dalam Afidavit Jawapan Keempat oleh Hoh Kiang Poh bertarikh 18hb September 2002 di Perenggan 8 Affidavit tersebut..." (documents mentioned in the Fourth Affidavit-in-Reply by Hoh Kiang Poh dated 18 September 2002, at para. 8 of the said affidavit ...).

The court observed that the purported documents which the defendants required or intended to be produced by the plaintiff *vide* encl. 25 and encl. 27 were never referred to or mentioned by the plaintiff in para. 8 of the said affidavit-in-reply, within the meaning of O. 24 r. 10(1) of the RHC 1980. Upon a proper reading of the plaintiff's para. 8 of the said affidavit-in-reply, it is clear that

the plaintiff did not allude nor made any reference or mention therein, whether specifically or in general, to any document(s) such as payment cheque for the said RM500,000 issued to the 2nd defendant or payment voucher for RM500,000 in favour of and signed by the 2nd defendant.

In their applications *vide* encl. 25 and encl. 27, the defendants were requesting for the production of copy of the cheque for a sum of RM500,000 which was alleged to be given as a loan to the 2nd defendant as well as copy of the voucher which was alleged to be signed by and in favour of the 2nd defendant for the purpose of the said loan.

Sub-paragraphs (c) (d) and (e) of para. 8 of the said affidavit-in-reply mentions about various cheques, but those cheques mentioned referred to cheques for repayment of the said loan by the 2nd defendant to the plaintiff, but not cheques earlier given by the plaintiff to the 2nd defendant as the loan itself, as requested by the defendants in their application *vide* encl. 25 and encl. 27.

Order 24 r. 10(1) of the RHC 1980 clearly provides the document to be produced thereunder must relate to document(s) which is referred to or mentioned in any pleadings or affidavit of the other party (the plaintiff in the present case): "... **in whose pleadings or affidavits reference is made to any document** ...". Documents which are not referred to or mentioned in any pleadings or affidavits of the party concerned are not subject to the provision of O. 24 r. 10(1) of the RHC 1980 and therefore cannot be ordered to be produced for inspection by the other party. The document must be referred to or mentioned expressly or specifically in the pleadings or affidavits. There must be a direct allusion to the documents in the pleadings or affidavits. It does not include reference by inference.

In *Dubai Bank Ltd v. Galadari & Ors (No 2)* [1990] 2 All ER 738, the English Court of Appeal held (at p. 744) that the phrase "reference is made to any document" in the RSC O. 24 r. 10(1) (which is *pari materia* with our O. 24 r. 10(1) of the RHC 1980) does not include reference by inference but instead imports the making of a direct allusion to a document or documents. In that case, Slade LJ said:

> To our minds, the phrase imports the making of a direct allusion to a document or documents ... The absence of a direct allusion to the document in the affidavit or pleading will merely mean that the other side will not have the right to seek production and inspection under Order 2 rule 10 itself.

A mere opinion that on the balance of probabilities, a transaction referred to in a pleading or affidavit (ie, about the earlier loan of RM500,000 given by the plaintiff to the 2nd defendant, in the present case) must have been affected

by a document, does not give the court jurisdiction to make an order under O. 24 r. 10(1), unless the pleading or affidavit makes direct allusion to the document or class of documents in question (see: *Dubai Bank* case). In applying O. 24 r. 10(1) of the RHC 1980, the task of the court must always be to extract the fair meaning of the words used in their context.

In our present case, para. 8 of the said affidavit-in-reply, avers about a separate and distinct loan of RM500,000 made by Yow Yow Mui (deceased) to the 2nd defendant involving her own funds or monies. These averments are actually reference to a state of affairs and to past transactions, and not reference to documents. References to a state of affairs and to past transactions, in all probability evidenced by documents, but they are not references to documents themselves. Again in *Dubai Bank Ltd* case the English Court of Appeal has ruled that reference to a state of affairs or to past transactions are not reference to any documents and thus O. 24 r. 10(1) is not applicable.

Fishing Expedition And Abuse Of Process Of Court

It is clear from the defendants' affidavit-in-support dated 2 December 2002 (encl. 26) at paras. 6, 7, 9 and 10 therein as well as paras. 6 and 14 of the defendants' written submissions dated 19 May 2003 that their summon-in-chambers application *vide* encl. 27 is in fact an application for the plaintiff to show proof.

As in all other civil suits, it is the plaintiff's burden to prove its case on the balance of probabilities, during the full trial of the suit. It is only during full trial that the plaintiff must call its witnesses and adduce all other relevant evidence in order to prove its case on the balance of probabilities. In the present case, whilst the plaintiff has stated at para. 8(f) of the said affidavit-in-reply as well as para. 4 of encl. 29 that the plaintiff is unable todate to trace or locate the relevant documents in respect of the separate loan of RM500,000 made by Yow Yow Mui (deceased) to the 2nd defendant, especially in view that the plaintiff deponent is unable to recall from which particular funds/deposits/investments of Yow Yow Mui (deceased) he had utilised in order to arrange for the separate loan of RM500,000 to the 2nd defendant, the plaintiff's deponent nevertheless went on to state in the last sentence of para. 8(f) of the said affidavit-in-reply that he verily believes this can be overcome by way of discovery and case management before the trial proper.

Therefore, the court is satisfied that the defendants' application *vide* encl. 27 is in reality an application for the plaintiff to show proof at an early stage of the proceedings and tantamounts to a fishing expedition and an abuse of process of the court especially in the light of the following:

(a) the "proof which the defendants seek from the plaintiff can only be properly elicited during pre-trial case management or discovery or during the course of the full trial;

(b) It is an abuse of process of the court because the plaintiff is currently unable to proceed with any or all pre-trial cases management and discovery due to the defendants' pending application for striking out (encl. 7) and the defendants' opposition to the plaintiff's application to amend the plaintiff's reply (encl. 19); both now fixed for reserved decision before the learned SAR on 15 July 2003.

There is a distinction between the rules of court ancillary to and corresponding with O. 24 r. 10 (relating to inspection of documents referred to in pleadings and affidavits) and the general rules as to discovery of documents (under O. 24 r. (1) - (9) of the RHC 1980). In *Quilter v. Heatly* [1883] 23 Ch D 50, Lindley LJ drew a distinction between the rules under O. 24 r. 10 of the RSC (which is *pari materia* with our O. 24 r. 10 of the RHC 1980) and the general rules as to discovery of documents. He said:

> These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings.

The rules relating to discovery cover much wider range of documents compared to the rules for inspection of documents under O. 24 r. 10 of the RHC 1980. The documents which are the subject matter to process of discovery are documents which are or have been in a party's possession, custody or power relating to any matter in question in the cause or matter. It covers all documents relating to any issue or question raised or relevant to any cause or matter before the court; and those documents must be or have been in his possession, custody or power.

While the rules relating to inspection of documents under O. 24 r. 10(1) of the RHC 1980 confine to a more limited scope of documents ie, only document(s) referred to or mentioned in any pleadings or affidavits in a cause or matter before the court. Documents which may be relevant in a cause or matter but not referred to in any pleadings or affidavits are excluded from the scope of the rules. The court has no power to grant an order requesting the plaintiff to allow inspection of those documents unless the defendants proceeded by way of an application for discovery under O. 24 r. 3 or 7 of the RHC 1980.

The defendants cited a number of cases as authorities to support the application. The first case cited is *Coopers & Lybrand v. Singapore Society of Accountants*

& Ors [1988] 3 MLJ 134. However, the court is of the view that that case may be distinguished from the present case because in that case it was not disputed that the defence by the defendants had made specific reference and directly alluded to a certain report of investigators; whereas in the present case the plaintiff's para. 8 of the said affidavit-in-reply did not allude nor made any specific reference to any of those documents which the defendants seek production of.

The next case cited by the defendants is *Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd* [1981] 1 MLJ 105. The court is satisfied that the case does not assist the defendants at all as it does not concern an application under O. 24 rr. 10(1) and 11(1) of the RHC 1980 but instead involved an application under the general pre-trial rules of discovery where the defendant therein had lamely contended in its affidavit in opposition to the application in question, that "there are tens of thousands on contracts, bills, invoices, delivery orders relating to the Tower Block" thus leading the Federal Court to correctly decide that the documents in question, the "tens of thousands" of them notwithstanding must be produced since they are relevant and that "the complexity or immensity of the tasks should not be a deterrence."

Similarly the Singapore High Court case of *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shen (t/a JB International)* [1990] 2 MLJ 282, cited by the defendants, does not involve an application under O. 24 r. 10(1) and 11(1) of the RHC 1980 but instead deals with an application by the defendant to strike out the plaintiff's action for failure of the plaintiff to comply with an "unless" order dated 31 August 1987 made under the general pre-trial rules of discovery where in that case the court had earlier on 21 January 1984 made an order for discovery and for exchanges of list of documents following a summons for directions under O. 25 of the Singapore RHC; subsequently the court upon application of the defendant ordered that the plaintiff file a further and better list of documents and in default of the same, the plaintiffs action be struck off; and subsequently the defendant applied by summons-in-chambers to strike out the plaintiff's action for failure of the plaintiff to comply with the court order. Therefore the case of *Manilal & Sons (Pte) Ltd* is a different kettle of fish altogether and clearly does not assist the defendants herein.

Conclusion

For the reason above stated, the defendants' appeal is dismissed with costs.